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Residential Property
TRIBUNAL SERVICE

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LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DECISION ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Property:	11 Lansdell House, Tulse Hill Estate, London SW2 2ER
Applicant:	London Borough of Lambeth (Home Ownership)
Respondents:	Mr R Agrawal and Ms A Agrawal
Hearing Date:	26th April 2010
In attendance:	Mr O Hinds (Counsel for the Applicant) Ms B Curtis of Judge & Priestley (Solicitor for the Applicant) Mr R Robinson (In-House Service Charge Co-ordinator for the Applicant) Mr J Sutherland of BPP Legal Advice Centre (representing the Respondents) Ms C Whitehouse of BPP Legal Advice Centre (representing the Respondents) Mr R Agrawal (one of the Respondents)

Members of Tribunal

Mr P Korn (chairman)
Mr T Sennett MA FCIEH
Mrs R Turner JP

INTRODUCTION

1. This is an application under Section 27A of the Landlord and Tenant Act 1985 (as amended) ("**the 1985 Act**") for a determination of reasonableness of and liability to pay service charges under the Respondents' lease totalling £1,679.76.

2. The Applicant is the Respondents' landlord in respect of the Property. The lease ("**the Lease**") is dated 21st February 2005 and the Applicant and the Respondents are the original parties to the Lease.

3. The case was transferred from Lambeth County Court by order of District Judge Zimmells on 30th December 2009. A Pre-Trial Review was held on 2nd February 2010 and Mr Agrawal (one of the Respondents) attended. The Applicant was not present and was not represented. At the Pre-Trial Review Mr Agrawal expressed a willingness to mediate.

4. Directions were issued following the Pre-Trial Review. The Applicant failed to comply with the directions, although the exact degree of non-compliance is unclear to the Tribunal.

5. Mr Robinson, in-house Service Charge Co-ordinator for the Applicant, presented his evidence and was cross-examined on it early on in the hearing. As a large part of the Respondents' case was made in the course of cross-examination those points made during that cross-examination will be summarised below as part of the Respondents' case.

RESPONDENTS' CASE

6. Mr Sutherland, representing the Respondents, was invited to put the Respondents' case first, so as to clarify in more detail what service charge items were in dispute and why.

7. Mr Sutherland said that the Respondents had offered to mediate but that the Applicant had only expressed any interest in mediation or negotiation on the morning of the hearing. The Respondents had also repeatedly asked for access to service charge records and answers to various questions but had still been given very little information.

8. The Respondents were disputing the amount of the service charge on the following grounds:-

    - the amounts being apparently unreasonable and the Applicant failing to provide sufficient information to justify them;

- non-recoverability under the Lease of the administration fee levied by the Applicant;

- the management fee being too high in certain service charge years;

- duplication between block and estate cleaning costs;

- items being charged that should have been covered by insurance;

- the Applicant failing to deduct costs incurred by the Respondents in relation to a shower unit and a central heating boiler; and

- the Respondents having a counterclaim for loss of earnings, distress and inconvenience in connection with the shower unit and central heating boiler problems.

9. On the question of reasonableness, Mr Sutherland said that there had been no real value for money. For example, certain communal lights had been left on all day during the 2009/2010 service charge year, and this had led to electricity wastage for which the leaseholders had been required to pay. Also, in relation to the 2005/2006 service charge year the actual cost had been much higher than the estimated cost but no explanation for the wide discrepancy had been given.

10. The administration fee was considered not to be recoverable as a matter of interpretation of the Lease. Paragraph 1 of Part 2 to the Fourth Schedule entitled the Applicant to charge 'management costs' (which the Applicant did indeed charge) but it did not entitle the Applicant also to charge an administration fee on top of this. In cross-examination by Mr Sutherland, Mr Robinson of the Applicant accepted that the Lease did not appear to contain any provision allowing the recovery of a separate administration fee on top of the management costs. It was contended on behalf of the Respondents that the administration fee was first introduced (in respect of the Respondents' service charge) in 2004/2005 and that it was £60 for that year and for 2005/2006. It was then £68 for the years 2006/2007 and 2007/2008.

11. In relation to the management costs, the Respondents accepted that the Applicant was entitled under the Lease to charge for "management costs being not less than 10% of the total Service Charge". However, in relation to the 2006/2007 service charge year the management costs represented 27.5% of the service charge and this was considered to be excessive.

12. Regarding the interrelationship between estate and block cleaning costs, the Respondents felt that there might be some duplication, although it seemed that their main point was that they did not feel that they had received sufficient information from the Applicant to satisfy themselves on that point.

13. Regarding the issue of repairs and insurance, the Respondents felt that certain matters should have been covered by insurance and that certain items had been misapplied to the service charge account.

14. Mr Sutherland raised in passing the issue of whether the Applicant had complied with Section 20B of the 1985 Act. However, this issue had not previously been mentioned as part of the Respondents' case and Mr Sutherland did not bring – or seek to bring – any specific evidence on this point.

15. The counterclaim issues are dealt with later on under a separate heading.

APPLICANT'S CASE

16. Mr Robinson, in-house Service Charge Co-ordinator for the Applicant, was called as a witness, as mentioned above. His witness statement referred to cleaning costs as being calculated in accordance with the Lease and briefly described what the cleaning charges cover. In relation to repairs, it stated that the Applicant believed all costs to have been correctly allocated and that no amounts that were properly recoverable through insurance had been charged to leaseholders as repairs. All contracts for ground maintenance were competitively tendered. The administration charge covered the cost of services provided exclusively to leaseholders and freeholders not attributable to a specific estate/block service (whereas the management charge covered the cost of managing the services). Regarding the complaint about the lighting being left on for too long, the Applicant had to consider the needs of elderly and disabled residents and health and safety considerations and then balance these against the desirability of keeping electricity costs to a minimum.

17. The Tribunal's attention was also drawn to Mr Malcolm's letter (on behalf of the Applicant) to the Respondents dated 22nd July 2008 addressing some of the concerns that they had raised, in particular in relation to the calculation of cleaning and ground maintenance charges, whether repairs to a burst water main should have been covered by insurance, and the calculation of management costs and the administration fee. A further letter dated 30th April 2009 answered certain queries raised by the Respondents regarding the 2007/2008 final accounts as did another letter dated 24th June 2009. Mention was also made of a letter dated 27th September 2006 which accompanied the summary of actual costs for the 2005/2006 service charge year inviting the Respondents to raise any queries that they may have.

18. Mr Robinson noted that the letter of 30th April 2009 referred to above confirmed that three specific job numbers – all relating to repairs/works – were applied to the service charge in error and should be removed. It appeared that this had not yet happened, and the Applicant conceded that they should be deducted from the amount being claimed by the Applicant in the County Court proceedings. It was agreed between the parties that the Respondents' share amounted to an aggregate sum of £57.59.

19. Mr Hinds for the Applicant submitted that the service charges were reasonable. The aggregate service charge sums were not excessive for an estate of this nature, and the Applicant had provided answers to the various queries raised by the Respondents, albeit that the Respondents were not satisfied with the answers that they had received. It was also noted that the Respondents had not raised the service charge queries as a 'second stage complaint' with the Applicant, in other words they had not properly utilised the Applicant's standard complaints procedure and had not raised all the various issues with the right people.

20. Mr Hinds said that the management costs and administration fee were not unreasonable and under the Lease the Applicant was entitled to charge over 10% if it wished to do so. Nevertheless, it was accepted that there was no specific entitlement under the Lease to charge a separate administration fee. There was some discussion as to whether a separate administration fee had in fact been charged in the years 2004/2005 and 2005/2006, but the Applicant conceded that a separate administration fee of £68.00 had been charged in each of the years 2006/2007 and 2007/2008 and that these sums were not properly payable.

21. Mr Hinds argued that the Respondents had not brought any comparable evidence from other estates or other blocks to show that the sums being charged were out of line with similar properties. In relation to Mr Malcolm's letter of 30th April 2009, whilst Mr Robinson had conceded that it was lacking in detail, Mr Hinds pointed out that Mr Malcolm's follow-up letter of 24th June 2009 was more detailed.

OTHER ISSUES ARISING OUT OF MR ROBINSON'S EVIDENCE

22. Mr Robinson conceded that Mr Malcolm's letter of 30th April 2009 to the Respondents on behalf of the Applicant was in several respects an inadequate response to apparently legitimate questions that they had raised. Mr Malcolm had not adequately addressed the questions of why a certain cost was not the responsibility of the water authority, why certain repair costs were not covered by insurance, why a repair job that appeared to relate solely to Flat 34 was being put through the service charge and whether the road blockers being charged for were for the benefit of the whole estate. He had also failed properly to address the complaints regarding a lack of cleaning. He also

conceded that the Applicant had inspected the block at the wrong time to reach any meaningful conclusion as to whether the lighting was being left on at inappropriate times.

23. The Tribunal raised some queries regarding some service charge accounting entries which appeared on the face of it to have been incorrectly allocated, but Mr Robinson was unable to answer these queries. The Tribunal also noted the length of time that it had taken the Applicant to prepare and provide service charge accounts to leaseholders.

COUNTERCLAIM

24. Mr Sutherland argued that the Respondents had essentially two separate types of counterclaim. The first concerned certain work that the Respondents had to carry out and the other related to the indirect costs of loss of earnings, distress and inconvenience.

25. The Respondents incurred costs of £252.63 by instructing a plumber to carry out a survey on the piping connected to a shower unit on the Property and to install new pipework. The shower had initially been installed before the Respondents acquired the Lease and the Applicant accepted liability for this sum in letters dated 22nd May and 20th June 2007. The Respondents also incurred costs of £339.99 in boiler repairs, which were necessitated by a leak into the Property caused by an overflow from the flat above in October 2006 which resulted in the boiler breaking. The Applicant accepted liability in principle in respect of this matter subject to receiving copy receipted invoices.

26. In relation to the more indirect costs, Mr Sutherland said that the Respondents were claiming the sum of £1,000 by way of damages for loss of earnings, distress and inconvenience (£500 each in respect of the shower and boiler problems respectively). The shower did not function for long periods and the Respondents were without heating and hot water for five days, causing distress to the mother of one of the Respondents. Mr Agrawal also had to take a considerable amount of time off work. The Applicant has offered £260 to the Respondents for the inconvenience etc but the Respondents consider £1,000 to be a more appropriate figure.

27. Mr Sutherland addressed the question of whether the LVT had jurisdiction to deal with these counterclaims by referring to the Lands Tribunal case of *Continental Property Ventures v White (LRX/60/2005)* and stating that this case was authority for the principle that the LVT had general jurisdiction to set off a counterclaim for damages against service charges. He also referred to the case of *Lee-Parker v Izzet (1971) 1WLR 1688* as authority for the proposition that a tenant has a common law right to withhold payment (in that case, payment of **rent**) by way of set-off in respect of amounts spent by the tenant on repairs that were the landlord's responsibility.

28. Mr Hinds in response submitted that *Continental Property Ventures* was of much narrower application than contended by Mr Sutherland and that it only allowed the LVT to take into account costs incurred which were directly referable to the service charge items in dispute. On that basis, he submitted that of the matters complained about by the Respondents only the lichen growth caused by the overflow referred to above could be taken into account and deducted from the service charge. Mr Hinds did not comment on the *Lee-Parker* case.

INSPECTION

29. The Tribunal members did not inspect the Property. Neither party requested an inspection and the Tribunal's view was that an inspection was not necessary in order for it to make a determination in the circumstances of the particular issues in dispute.

THE LAW

30. Section 19(1) of the 1985 Act provides:

"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard

and the amount shall be limited accordingly."

31. "Relevant costs" are defined in Section 18(2) of the 1985 Act as *"the costs or estimated costs incurred or to be incurred by or on behalf of the landlord...in connection with the matters for which the service charge is payable"*.

"Service charge" is defined in Section 18(1) of the 1985 Act as *"an amount payable by a tenant of a dwelling as part of or in addition to the rent (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlord's cost of management, and (b) the whole or part of which varies or may vary according to the relevant costs"*.

32. Section 27A of the 1985 Act gives a leasehold valuation tribunal jurisdiction to determine (on an application made to it) *"whether a service charge is payable and, if it is, as to...the amount which is payable..."*.

APPLICATION OF LAW TO FACTS

Points conceded

33. It is noted that the Applicant concedes that three specific items relating to repairs/works were applied to the service charge in error and should be removed and that the amount that should be deducted in this respect is £57.59. This figure was agreed by the Respondents.

34. The Applicant also concedes that the cost of removing the lichen growth should properly be deducted from the service charge. The total cost of removing it was £188.35 of which the Respondents share is 2.38%, i.e. £4.48.

Administration fee

35. In relation to the administration fee, the Applicant concedes that this is not payable in respect of either 2006/2007 or 2007/2008 and that therefore there should be a deduction of £68.00 for each of these two years. This reduces the item described in the certified summary of service charges simply as 'Management Charge' to £26.31 for 2006/2007 and to £53.18 for 2007/2008.

36. As regards the administration fee for the other years, the Tribunal agrees with the Respondents that the Lease does not allow the Applicant to recover a separate administration fee on top of the management charge, albeit that if the Applicant had simply charged a slightly higher management charge it **might** have been arguable (depending on what the charge covered) that this higher management charge **would** have been recoverable in full. As the Lease is dated 21st February 2005 the Tribunal is not satisfied that the Respondents will have been unduly burdened by its small share of the £60.00 administration fee for the 2004/2005 year, if indeed it was charged separately, and insufficient evidence was brought as to what that share might have been. As regards 2005/2006, whilst the evidence available to the Tribunal is imperfect, it seems to the Tribunal on balance that an administration fee of £60.00 probably was charged separately and that the Applicant was not entitled to charge it as a separate amount. Accordingly, this amount of £60.00 in respect of the 2005/2006 year is not considered to be payable and this reduces the item described in the certified summary of service charges just as 'Management Charge' to £62.06 for 2005/2006.

Management charges

37. In relation to the management charges generally, the Tribunal has some concerns about the standard of management, albeit that some of the concerns relate to the period falling outside the years in respect of which the County Court proceedings were issued. Specifically in the context of the preparation for the case before this Tribunal, the Applicant failed to attend the Pre-Trial

Review, failed to comply with directions and seemingly failed to engage with the Respondents' offer to mediate until the morning of the hearing. The quality of the information provided by the Applicant to the Respondents has, in the Tribunal's view, been very poor. Mr Malcolm, as was conceded by Mr Robinson at the hearing, provided inadequate responses to apparently reasonable queries raised in writing by the Respondents. There was an unacceptable amount of delay in the Applicant producing service charge accounts, and there were a number of accounting entries that the Applicant was unable to explain at the hearing. Instead of dealing with the Respondents' complaints regarding cleaning the Applicant had simply invited the Respondents to take the matter up with its estate manager, who of course is responsible to his/her line manager and not directly to the Respondents.

38. Whilst some of the above failings are recent, many seem to have occurred in the years 2006/2007 and 2007/2008. Taking all of the relevant failings into account, the Tribunal considers that the Applicant should only be paid a relatively nominal management fee for the years 2006/2007 and 2007/2008, and the Tribunal sets this at £10.00 for each of these years. This represents a further reduction of the already reduced figures (by virtue of the administration fee having been deducted).

39. To summarise in relation to the administration fee and management charges, the 2005/2006 amount is reduced from £122.06 to £62.06 (i.e. by £60.00), the 2006/2007 amount is reduced from £94.31 to £10.00 (i.e. by £84.31) and the 2007/2008 is reduced from £121.18 to £10.00 (i.e. by £111.18).

Communal lighting

40. As regards the issue of communal lighting, whatever the merits or otherwise of the Respondents' case on this issue, the complaints relate to the 2009/2010 service charge year and are therefore not relevant to the current dispute which relates to service charges being claimed in respect of a period prior to the start of the 2009/2010 service charge year. Therefore, no deduction can be made in relation to excessive lighting costs.

Cleaning

41. In relation to the Respondents' complaints about possible duplication between block and estate cleaning costs, whilst it is possible that there has been some duplication insufficient evidence has been brought to demonstrate that this is the case and therefore the Tribunal is not in a position to make a deduction in this regard.

Counterclaim

42. The Respondents have made a counterclaim in respect of works carried out and loss of earnings, distress and inconvenience in connection with the issues giving rise to the need for those works. Mr Sutherland cited the Lands Tribunal case of *Continental Property Ventures v White (LRX/60/2005)*. In that case, the Lands Tribunal ruled that if the cost of repairs is increased as a result of historic neglect then this did not by itself make the cost of carrying out repairs unreasonable as a service charge item. The issue was whether costs had been 'reasonably incurred' and this did not depend on how the need for the repairs arose. However, the Lands Tribunal went on to state that if the landlord was in breach of its repairing covenants this could give rise to a claim in damages (if the tenant could establish that the breach has caused it loss or extra expense) and that there was no reason why such a claim could not be pursued in the context of a Section 27A application in the LVT by way of equitable set-off.

43. Applying the above reasoning (with which this Tribunal concurs), the historic neglect argument is irrelevant to the question of whether costs were 'reasonably incurred' but can in appropriate circumstances give rise to a claim for damages which the LVT has jurisdiction to hear. However, it is clear from the Lands Tribunal's reasoning that the jurisdiction arises only where determining the claim for damages is essential to determining whether a particular head of service being claimed or challenged is in fact payable. Therefore, the jurisdiction does not extend beyond counterclaims directly relevant to the claimed or disputed head of service charge. Therefore, in the Tribunal's view, only the counterclaim relating to the cost of removing the lichen growth falls with its jurisdiction, and this item has been conceded by the Applicant. The Tribunal does not consider the case of *Lee-Parker v Izzet* to be relevant in this regard as that case is not relevant to the extent of the LVT's jurisdiction. The proper forum for raising any other elements of the Respondents' counterclaim is the County Court. In passing, it should be noted that the Applicant has previously made a compromise offer in relation to the shower and boiler issues and it may well be that this compromise offer still stands.

DETERMINATION

44. The aggregate sum being claimed by the Applicant, namely £1,679.76, shall be reduced by the following amounts:-

- £57.59 (repairs/works charges applied to the service charge account in error)
- £60.00 (reduction in management charges for 2005/2006)
- £84.31 (reduction in management charges for 2006/2007)
- £111.18 (reduction in management charges for 2007/2008)

- £4.48 (lichen growth)

45. Of the amount claimed by the Applicant, the amount payable is therefore reduced by £317.56 to **£1,362.20**.

46. The Respondents applied for an order under Section 20C of the 1985 Act that none of the costs incurred by the Applicant in connection with these proceedings should be recoverable as service charge. For the reasons already given above, in particular in paragraph 37, the Tribunal has serious concerns about the Applicant's standard of management and its approach to this case and considers that it would be unfair for the Applicant to be allowed to recover its costs in connection with these proceedings through the service charge. The Tribunal therefore hereby orders that none of the Applicant's costs in connection with these proceedings may be recovered through the service charge.

47. No other cost applications were made by either party.

CHAIRMAN.....
Mr P Korn

11th May 2010